United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-7108

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P/S

United States Court of Appeals

For the Second Circuit

Docket No. 76-7108

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

and

CHARLES LONG, *et al.*, individually, etc.,

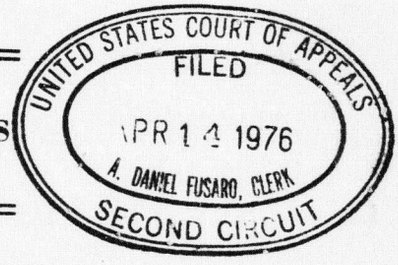
Appellees,

v.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, *et al.*,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF FOR APPELLANTS OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, *et al.*

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No. 76-7108

In The

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DRYWALL TAPERS AND POINTERS OF
GREATER NEW YORK, LOCAL 1974,

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CHARLES LONG, et al.,
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Appellees

v.

OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION,
et al.,

Appellants

On Appeal from the Order of the United States
District Court for the Southern District of New York
Granting A Preliminary Injunction

BRIEF ON BEHALF OF THE APPELLANTS

ISSUES PRESENTED

1. Whether the District Court's March 12, 1976, Order issuing a preliminary injunction against the Appellants which requires them to remove persons from jobsites throughout the United States amounts to an abuse of the Court's discretion.

2. Whether the Norris-LaGuardia Act deprives the District Court of jurisdiction to issue a preliminary injunction.

STATEMENT OF THE CASE

This case involves an appeal from an Order dated March 12, 1976, signed by Judge C.M. Metzner of the United States District Court for the Southern District of New York.

On or about August 28, 1975, the Plaintiffs-Appellees filed a Verified Complaint alleging a series of jurisdictional disputes which have occurred on various construction jobsites in the Metropolitan New York area since September 1974 between the Plaintiff-Appellee Drywall Tapers and Pointers of Greater New York Local 1974 (hereinafter "Local 1974") and three Local Unions, 60, 202 and 852, affiliated with the OP&CMIA. The Plaintiffs-Appellees claim that the OP&CMIA and its Local Unions (Defendants-Appellants) have asserted both work jurisdiction and bargaining rights over certain drywall pointing and taping work on these jobs, which under a 1961 Memorandum of Understanding signed by Local 1974's parent union, the International Brotherhood of Painters and Allied Trades (hereinafter "IBPAT") and the OP&CMIA was work allegedly belonging to persons who are exclusively represented by Local 1974 (6a-18a).[1/]

1/ References to page numbers designated "a" are to the printed appendix.

The Plaintiffs moved for a preliminary injunction (25a) and the Defendants cross-moved to dismiss the Complaint for failure of the Plaintiffs to exhaust their intra-union contractual remedies (40a). The District Court heard oral argument on the motions in October 1975, and on November 5, 1975, the Court issued a decision (300a-308a). Although the Court denied both motions, it nevertheless decided upon a means to resolve the jurisdictional dispute between the parties (NOT suggested by any party) by ordering that Local 1974 through its international union and the OP&CMIA "petition the Joint Administrative Committee for immediate referral [of the dispute] to the Hearings Panel", under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The Court stated that "upon a showing that the Plasterers [Defendants] are not cooperating or that the Building and Construction Trades Department refuses to follow its own published Plan", the motions could be renewed (emphasis added).

Thereafter, by notice served on the Defendants returnable on February 9, 1976, the Plaintiffs renewed their motion for preliminary injunction. The Defendants OP&CMIA and Local 60 cross-moved for summary judgment on the ground that the Plaintiffs failed to exhaust their contractual remedies thus depriving the Court of subject matter jurisdiction (312a). The Plaintiffs thereupon cross-moved for partial summary judgment on several issues of liability (342a). Without a hearing on the various motions, the District Court denied the Plaintiffs' and Defendants' cross-motions for summary judgment and granted the Plaintiffs'

motion for a preliminary injunction in a decision dated March 5, 1976 (371a-376a). The Court found that the Defendant OP&CMIA failed to join with the IBPAT in its December 11, 1975, application to the Joint Administrative Committee and failed to take any steps to resolve the matter administratively. In addition, the Court found that the Joint Administrative Committee's failure to take action on the Plaintiffs' application was sufficient to amount to exhaustion of remedies by the Plaintiffs. Finally, the Court found that although there were issues of fact with respect to the present viability of the 1961 Memorandum of Understanding, it is likely that the Plaintiffs will prevail on the merits of their claim. On the basis of these findings, the District Court ruled that a preliminary injunction shall issue against the Defendants.

As required by the Court, the parties submitted proposed orders and on March 12, 1976, the Court entered its Order requiring the Defendants to comply with the 1961 Memorandum of Understanding by immediately removing and/or causing to be removed from the performance of any work involving taping or pointing of drywall surfaces (except for any drywall surfaces that are to receive plaster finish, accoustical finish or imitation accoustical finish), at any jobsite or jobsites, wheresoever located, at which such work is being performed or is to be performed, any and all persons presently performing such work who are members of the Defendants or of any subordinate body of any of the Defendants. In addition, the District Court's Order enjoins the Defendants, their officers, agents, servants, employees and attorneys and all

persons in active concert or participation with any of them from causing, encouraging, advising, counseling or permitting any members of the Defendants or of any subordinate body of any of the Defendants, to perform, or to accept employment to perform the work described above. Finally, the March 12 Order enjoins the Defendants and all persons in active concert or participation with any of them from asserting either jurisdiction or bargaining rights over any work, at any jobsite wheresoever located, involving the above-mentioned work (378a-380a).

The District Court stayed its order to March 17, 1976, pending application to the Court of Appeals for a further stay. The Appellants filed their notice of appeal with the District Court, and their motion for stay and supporting affidavit with this Court on March 12, 1976. On March 15, 1976, the Appellants filed a memorandum in support of their motion and on the same day, the Court of Appeals extended the stay until March 23, 1976. Opposing papers were filed by the Appellees and a reply brief and affidavit were filed by the Appellants on March 22, 1976. The Court heard argument on the motion for stay on March 23, 1976, and on the same day it decided to extend the stay until argument of the Appellants' appeal could be heard on April 28, 1976.

FACTUAL BACKGROUND

The Appellants OP&CMIA and Locals 60, 202 and 852 of the OP&CMIA and the Appellee Local 1974 through its parent international union, the IBPAT, are members of the Building and Construc-

tion Trades Department of the AFL-CIO and they are bound by the Department's Constitution which provides in Article X that:

> "All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions." (43a-44a, 56a)

Pursuant to the above-quoted provision, the Appellants and the Appellees have at all times material herein been obligated to resolve work jurisdictional disputes in accordance with the Plan of the Settlement of Jurisdictional Disputes in the Construction Industry (hereinafter "National Plan"), which is an agreement between the Building and Construction Trades Department and various employer associations, effective June 1, 1973 (revised effective June 1, 1975) (61a-73a). Article VIII, Section 2(a) of the National Plan states that:

> "The Department and each of its affiliated Unions agree that all cases, disputes or controversies involving jurisdictional disputes and assignments of work arising hereunder shall be resolved as provided herein and shall comply with the decisions and awards of the Board, the Appeals Board or Hearings Panel established hereunder." (44a-45a, 68a)

Article IX of the National Plan provides that where a local plan for the settlement of jurisdictional disputes exists,

such local plan shall be used in the first instance to resolve jurisdictional disputes subject to appeal to the Impartial Jurisdictional Disputes Board (the basic hearing body established by the National Plan to hear and resolve jurisdictional disputes) (45a, 70a). New York has a local plan for the settlement of jurisdictional disputes which is recognized by the National Plan (45a). Jurisdictional disputes in the Metropolitan New York area are heard in the first instance by the Executive Committee of the Building Trades Employers' Association (hereinafter "BTEA"). Jurisdictional decisions issued by the BTEA are binding unless appealed and reversed by the Impartial Jurisdictional Disputes Board (70a).

The present dispute began in March 1975, when the Appellee Local 1974 requested from the BTEA under the New York Plan mediation of an alleged change of assignment of drywall pointing and taping work from members of Local 1974 to members of the Appellants Local Unions on a project known as Metro North, located in Manhattan (47a, 76a, 78a). The drywall contractor, National Wall Systems, Inc., had subcontracted to Vincent Colletti & Co., a plastering contractor, the pointing and taping work for buildings 2 and 3 of the Metro North project. Colletti did not have a collective bargaining agreement with the Appellee Local 1974, but for many years has had an agreement with Appellants Locals 60, 202 and 852. The pointing and taping work performed on the Metro North project by Colletti's employees was performed with a plaster mater-

ial known as "Sta-Smooth" rather than an adhesive material which was used by members of Local 1974 on the project (Id.).

The mediation requested by Local 1974 was held by the BTEA on April 8, 1975. The record of this meeting shows that the Appellee Local 1974 objected to the alleged change of assignment but did not object to the use of the material "Sta-Smooth" by members of the Appellants Local Unions on the project, which material was then being chemically analyzed to determine which trade (Pointers and Tapers or Plasterers) was entitled to use the material (47a, 80a-82a). The BTEA mediation determined that the Appellee's objection to the alleged change of assignment did not create the existence of a jurisdictional dispute (Id.). On April 21, 1975, the Appellee Local 1974 through its parent international, the IBPAT, requested the Impartial Jurisdictional Disputes Board to hear an appeal of the case on the question of the alleged change of assignment of the pointing and taping work (84a). While the Impartial Jurisdictional Disputes Board was corresponding with the IBPAT for additional details, the BTEA held another mediation meeting on May 15, 1975, at which time the contesting parties disputed whether "Sta-Smooth" was a plaster or adhesive material. Since no resolution was reached, Appellee Local 1974 requested arbitration under the New York Plan (47a-48a, 86a). In the meantime, the Impartial Jurisdictional Disputes Board referred the IBPAT request for a hearing to the BTEA since under Article IX of the National Plan the local board is required to decide these disputes in the first instance (48a).

The BTEA held the arbitration hearing on June 4, 1975. The transcript of this hearing discloses that both the Appellants and the Appellees produced laboratory analyses of the "Sta-Smooth" product being used on the Metro North project (129a-162a). The Appellees argued that the material was an adhesive which only members of Local 1974 were permitted to use under the May 19, 1947, Decision of Record contained in the "Green Book" (a booklet containing the National Plan and various jurisdictional agreements and decisions affecting the building industry) which states that:

> "When plaster material is used to do pointing and filling it shall be the work of members of the Operative Plasterers and Cement Finishers International Association of the United States and Canada--and/or--members of the Bricklayers, Masons and Plasterers International Union of America.
>
> When adhesive materials are used it shall be the work of members of the Brotherhood of Painters, Decorators and Paperhangers of America." (74a)

In addition, the Appellees briefly mentioned that members of Local 1974 were entitled to do the work in question because of a 1961 Memorandum of Understanding which states in pertinent part as follows:

> "1. All pointing and taping of drywall, regardless of material used, is Painters' work, providing the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes. The application of texturing to drywall surfaces is the work of Painters where paint materials are used.
>
> 2. The application of plaster, acoustical or imitation acoustical finishes shall be the work of the Plasterers, as well as the

> preparatory pointing and taping of drywall surfaces that are to receive these finishes." (191a)

On June 12, 1975, the BTEA issued its decision stating that:

> ". . . Sta-Smooth, used for Pointing, Taping and Filling, application of.
>
> Tapers Union Local 1974 vs. Plasterers Union Local 60 -- Metro North, 101st St. and East River Drive, Buildings No. 3 and 4, New York City.
>
> The Executive Committee finds that the material (Sta-Smooth) used for Pointing, Taping and Filling of joints on drywall is a plaster material and is the work of the Plasterers. -- Decision of the Executive Committee, June 11, 1975." (88a)

Apparently, the BTEA found itself in agreement with the "Green Book" Decision of Record which grants pointing and taping work jurisdiction to the OP&CMIA when plaster materials are being used.

On June 18, 1975, the IBPAT appealed the June 12, 1975, decision of the BTEA to the Impartial Jurisdictional Disputes Board, and on June 20, 1975, the Board agreed to hear the appeal (90a). The Impartial Jurisdictional Disputes Board was subsequently notified that Appellee Local 1974 was pursuing arbitration against National Wall Systems, Inc. on the Metro North project which arbitration the Board felt would affect work jurisdiction. As such, by proceeding with the arbitration, Appellee Local 1974 was violating Article VII, Section 5 of the National Plan which prohibits a union from attempting to establish work jurisdiction on a unilateral basis through arbitration with an employer (49a).

In view of the pending arbitration proceeding, the Board notified the IBPAT on July 10 that its hearing of the appeal was postponed indefinitely until the Appellee Local 1974 had decided to either pursue the appeal to the Impartial Jurisdictional Disputes Board or to continue with the arbitration proceeding (92a-93a, 98a-99a). Thereafter, on July 18, 1975, the Impartial Jurisdictional Disputes Board again notified the IBPAT that:

> "This Notice of Intention to Arbitrate involves jurisdiction and is in violation of Article VII, Section 5 of the Plan and your Local Union should be so notified.
>
> Again, until this office is advised that the arbitration has been dropped, the hearing of your appeal is postponed indefinitely." (101a)

Finally, on August 7, 1975, when the Impartial Jurisdictional Disputes Board still had not been notified that the arbitration was dropped, it withdrew its acceptance of the IBPAT appeal from the June 12, 1975, BTEA decision issued under the New York Plan (103a-104a).

Significantly, on or about July 28, 1975, during the very time that the Appellee Local 1974 was persisting in its arbitration with National Wall Systems, Inc., which really involved a jurisdictional dispute, <u>all General Presidents</u> of the unions affiliated with the Building and Construction Trades Department (including the General President of the IBPAT) signed a statement condemning resort to arbitration to resolve jurisdictional issues as violative of Article VII, Section 5 of the National Plan (106a-109a).

As previously noted, the present litigation was instituted by the Appellees on August 28, 1975. The Appellees' Verified Complaint seeks a permanent injunction from the Court based upon the 1961 Memorandum of Understanding. While pursuing their first motion for preliminary injunction before the District Court, the Appellees filed with the President of the AFL-CIO in September 1975 a charge against the Appellants under Article XX, Section 2 of the AFL-CIO Constitution (274a, 280a). The Plaintiffs alleged that the OP&CMIA had interfered with the Appellees' established collective bargaining relationship with the Metropolitan New York Drywall Contractors Association, Inc. by attempting to organize and represent for bargaining purposes persons presently represented by Local 1974 (276a). A hearing was held before the Impartial Umpire on December 3, 1975, and on January 9, 1976, the Impartial Umpire issued a decision finding that the Appellants had violated Article XX, Section 2 (330a-331a, 336a-340a). The decision did not contain any directive to the Appellants requiring them to do anything to terminate their alleged violation of Article XX, Section 2.

By letter dated January 13, 1976, the Appellant OP&CMIA filed a timely appeal of the Impartial Umpire's decision to the President of the AFL-CIO (334a). Pursuant to a procedure set forth in Article XX, the Appellants' appeal was referred to a subcommittee of the Executive Council of the AFL-CIO for determination as to whether the Impartial Umpire's decision would be summarily affirmed or whether the case would be presented to the Exec-

utive Council for a final decision (331a). A hearing was held by the subcommittee of the Executive Council on March 10, 1976, and on March 22, 1976, the President of the AFL-CIO notified the Appellants that the case would be presented to the Executive Council for decision. A hearing before the Executive Council is set for May 19, 1976.[2/] Pending outcome of the appeal, the Impartial Umpire's decision is stayed (331a).

As noted above, the District Court issued a decision on November 5, 1975, denying Appellees' motion for preliminary injunction and Appellants' motion to dismiss. The District Court found that the action filed by Local 1974 involves a jurisdictional dispute "arising out of job assignments in the prefinishing treatment (taping and pointing) of drywall joints in the construction of buildings using wallboard materials," and that the sole issue in the case was the applicability of two conflicting jurisdictional definitions, i.e., the May 19, 1947 Decision of Record contained in the "Green Book" or the 1961 Memorandum of Understanding. The Court held that the question of which jurisdictional definition should control the assignment of pointing and taping work is one which the Building Trades Department was better suited to decide by means of its National Plan. Rather than dismissing the case or merely staying it to allow the Appellees an opportunity to exhaust their remedies before the Impartial Jurisdictional Dis-

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[2/] The letter of the President of the AFL-CIO was not received until March 24, 1976, therefore it is not a part of the record before the Court of Appeals.

putes Board, the District Court required Local 1974 through the IBPAT and the OP&CMIA "to petition the Joint Administrative Committee for immediate referral [of the dispute] to the Hearings Panel", under the National Plan (308a). The District Court's direction was not a remedy which had been proposed by any party.

By letter dated December 11, 1975, the IBPAT filed with the Joint Administrative Committee a request that the Committee refer to a Hearings Panel the sole issue of the present applicability of the 1961 Memorandum of Understanding (326a-327a). This letter was sent to the Joint Administrative Committee six days after the Appellees had filed suit against the IBPAT seeking an injunction from the District Court requiring the IBPAT to make such a request (Drywall Tapers and Pointers of Greater New York Local 1974 et al. v. IBPAT, No. 75 Civ. 6127). The Appellants and their attorneys did not at any time prior to service of the Appellees' renewed motion for preliminary injunction in late January 1976 receive notice of the IBPAT's December 11, 1975, letter to the Joint Administrative Committee or of the Appellees' or the IBPAT's intention to send such a letter. The Appellants did not understand the District Court's November 5, 1975, decision to require them to file a separate request with the Joint Administrative Committee, but only to cooperate with the Appellees' efforts to obtain relief from the Committee. As noted, neither the Appellees nor the IBPAT contacted the Appellants about jointly petitioning the Committee. Not having been contacted or requested to cooperate, the OP&CMIA naturally assumed that the Appellees

at that time did not desire to submit the dispute to the Joint Administrative Committee (345a-350a).

On March 5, 1976, the District Court issued a decision holding that a preliminary injunction shall be granted because of the Appellants' failure to separately request the Joint Administrative Committee to take action on the jurisdictional dispute (371a-376a). In light of this ruling, the Appellants immediately requested the Joint Administrative Committee to take action on the dispute in a letter dated March 12, 1976, from the General President of the OP&CMIA (Boyle Affidavit attached to Motion for Stay). Unlike the IBPAT's December 11, 1975, request, the OP&CMIA asked the Joint Administrative Committee to refer to a Hearings Panel in accordance with Article X, Section 4 of the National Plan all pertinent evidence concerning the jurisdictional dispute including: (1) the present applicability of the 1961 Memorandum of Understanding; (2) the present applicability of the May 19, 1947 Decision of Record contained in the "Green Book"; and (3) all other evidence any party desires to submit. The OP&CMIA further pointed out in its letter to the Joint Administrative Committee that the BTEA had considered the present dispute between the Appellees and the Appellants and that a decision had been issued by the BTEA on June 12, 1975. This decision was appealed to the Impartial Jurisdictional Disputes Board, but before the Board could hear the case, the Appellees became involved in an arbitration which the Board found to be inconsistent with the IBPAT's appeal. The OP&CMIA's March 12, 1976, letter notes that the Appellees' arbitration has

now been concluded and that in a decision dated November 28, 1975, the arbitrator refused to resolve the jurisdictional questions which were inherent in the arbitration. The OP&CMIA suggested that in light of this ruling, the Joint Administrative Committee may wish to consider referring the dispute between the Appellees and the Appellants to the Impartial Jurisdictional Disputes Board for a hearing on the Appellees' original appeal in the event that the Committee refuses to refer the matter to a Hearings Panel for a decision.

On March 9, 1976, the New York Supreme Court issued a memorandum decision in a case filed by the Appellee Local 1974 in September 1975 against the Appellant Local 60 to vacate and set aside the June 12, 1975, BTEA decision on pointing and taping work jurisdiction (In the Matter of the Arbitration of a Certain Controversy between Drywall Tapers and Pointers of Greater New York, IBPAT and Operative Plasterers' Local 60, Index No. 15962/75). The New York Supreme Court (Judge Gellinoff) held that based upon the record before it, the BTEA had improperly refused to grant the Appellee Local 1974 an adjournment to allow Local 1974 an opportunity to obtain a witness for the hearing. The court stated that situation warranted a vacatur of the BTEA decision and the directing of a new hearing. No order has yet been entered by the court.

SUMMARY OF ARGUMENT

This case involves an appeal from an Order signed on March 12, 1976, by Judge C.M. Metzner granting a preliminary injunction against the Appellants. In reviewing said Order, the Court must determine whether the issuance of the preliminary injunction amounted to an abuse of the District Court's discretion. Huber Baking Co. v. Stroehmann Bros. Co., 208 F.2d 464 (2d Cir. 1953); Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974). The Appellants contend that the District Court abused its discretion in several respects. First, the District Court failed to conduct a hearing and make findings of fact with respect to the requisites for temporary injunctive relief before issuing a sweeping nationwide injunction. The Appellants raised serious issues of fact concerning the underlying basis for the injunction, and the District Court made no attempt to resolve these issues.

Secondly, the District Court has drastically altered the status quo in the present case by its Order. The Court has conferred on the Appellees a completely new status which, in fact, they did not even request in their Verified Complaint. Thirdly, the District Court failed to consider and the Appellees have failed to establish, the basic requisites for the issuance of a preliminary injunction, i.e., probable success on the merits, irreparable harm, and balance of interests. There are many unresolved issues of fact and law with respect to the Appellees' likelihood of

success on the merits. These issues include the Appellees' unfulfilled obligation to exhaust their contractual remedies before filing suit. Moreover, the District Court did not at any time attempt to determine whether the Appellees would suffer irreparable harm if an injunction did not issue or attempt to determine the effect of an injunction on the Appellants. The Appellants argue that the injunction has a disastrous effect on them.

Finally, the Appellants contend that the District Court did not have jurisdiction to issue an injunction in the present case. The Norris-LaGuardia Act, 29 U.S.C. §101 et seq., specifically prohibits the issuance of injunctions in circumstances like those involved in the present case, and, in any event, the District Court failed to follow certain specific procedures set forth in the Act which must be followed prior to the issuance of an injunction.

ARGUMENT

I. The District Court Abused Its Discretion By Granting A Preliminary Injunction In Its Order Dated March 12, 1976

A. The District Court Failed to Conduct a Hearing and Make Findings of Fact with respect to Appellees' Entitlement to a Preliminary Injunction.

It is a basic principle of law that where there are disputed issues of fact with respect to the subject matter of a complaint, conflicting affidavits are an insufficient basis for a court's decision to issue a preliminary injunction. The court

must hold a hearing allowing the presentation of live testimony prior to issuing an injunction under such circumstances. This Court has repeatedly held that where there are disputed issues of fact, a temporary injunction should not issue on the basis of affidavits save in instances of extreme emergency. SEC v. Frank, 388 F.2d 486, 491 (2d Cir. 1968); Cerruti, Inc. v. McCrory Corp., 438 F.2d 281, 284 (2d Cir. 1971); Carter-Wallace Pharmacal Co. v. Davis-Edwards Pharmacal Co., 443 F.2d 867, 872 (2d Cir. 1971).

In the present case, the District Court found in its decision dated March 5, 1976, that the 1961 Memorandum of Understanding between the OP&CMIA and the IBPAT was a viable agreement and that a preliminary injunction shall issue based upon the Memorandum's viability. Nevertheless, the Court admitted with respect to the Appellees' cross-motion for partial summary judgment on the issue of the present viability of the 1961 Memorandum of Understanding that:

> "While the court has determined that it is likely that plaintiff will prevail on the merits, defendants have raised questions of fact going to the viability of the 1961 Memorandum. At this early stage of the proceedings, pre-discovery and with a substantial factual matter in issue, summary judgment for either side is clearly inappropriate."

Indeed, affidavits submitted by the Appellants to the District Court for the purpose of raising issues of fact clearly state that the 1961 Memorandum of Understanding has for several years been abrogated by Appellees' parent union, the IBPAT. In fact, the General President of the IBPAT reported to his General Executive

Board in January 1972 that the IBPAT considered the Memorandum abrogated (52a, 112a). Moreover, the Appellees have consistently based their requests for job decisions from the Impartial Jurisdictional Disputes Baord on the May 19, 1947 Decision of Record contained in the "Green Book" and only secondarily on the 1961 Memorandum of Understanding (269a, 286a-298a).

It is clear that the District Court should have addressed itself to the disputed issues of fact concerning the viability of the 1961 Memorandum of Understanding prior to issuing a sweeping preliminary injunction. The only hearing conducted by the District Court in the instant case was that which was held on October 3, 1975, with respect to the Appellees' initial motion for preliminary injunction and the Appellants' cross-motion to dismiss. This hearing was limited by the Court to argument by counsel. Such a hearing was obviously an insufficient basis for the District Court's March 12, 1976, injunction.

As part of their response to the Appellants' motion to this Court for stay of the District Court's Order, the Appellees have argued that the Appellants, in effect, "sat" on their rights to a hearing and should not now be heard to complain that they were not granted a hearing. It is true that this Court has recognized in principle the argument that one who joins "the battle of affidavits with as much relish as the [plaintiff]" should not be heard to complain when the decision is adverse. Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970). However, the present case is not at all similar to those situations

to which this principle is applicable. The Semmes case involved a request for a temporary restraining order by an automobile dealer to prevent the termination of his and various other dealers' licenses by the defendant manufacturer. The court refused to issue the temporary restraining order, but in view of the urgency of the matter, the court set the case down for hearing on plaintiff's motion for preliminary injunction six days later. Before the hearing was held, the District Court was literally flooded with affidavits by both plaintiff and defendant. The affidavits and exhibits continued to pour in even after the hearing was held. Finally, after considering all of the affidavits and exhibits, the District Court issued a temporary injunction against the defendant. The District Court found the defendant "had opportunity before, at and after oral argument. . . to offer and submit all papers and matters referred to by its attorney on the oral argument" and that "in that subsequent submission and in the later motion for reargument no request was made to the Court by any of the parties to hear oral testimony." 429 F.2d at 1205. In ruling on the defendant's argument that it was improperly denied an evidentiary hearing, the Second Circuit stated that:

> ". . . We recognize that this case differed from [SEC v. Frank, supra] in the greater urgency of [the plaintiffs'] need, and we would have had no difficulty if the court had issued a temporary restraining order against termination; if [the defendant] wished to present live testimony and this could not have been concluded within the twenty day period of F.R.Civ.P. 65(b), conditioning such presentation on ar

> appropriate stipulation for extension of the restraining order would have solved the problem. However, so far as we can see, [the defendant] joined the battle of affidavits with as much relish as the plaintiffs. A party who chooses to gamble on that procedure cannot be heard to complain of it when the decision is adverse." 429 F.2d at 1204-5.

The present case is clearly distinguishable from the fact situation in Semmes. The Appellees' Verified Complaint was filed on August 28, 1975, and the initial motion for preliminary injunction was filed on September 3, 1975. The Appellees agreed to an adjournment until September 17, 1975, for the Appellants' response. The Appellants filed a cross-motion to dismiss and a single affidavit which went primarily to the Appellants' argument that the Appellees had not exhausted their administrative remedies. Briefly, the affidavit touched upon the major issues raised by the Appellees' motion for preliminary injunction pointing up issues of fact which the District Court was required to resolve. When the Appellees filed a second affidavit (by a different affiant) in support of their motion, the Appellants again briefly responded with an affidavit raising still more issues of fact.

Argument by counsel was set for October 3, 1975, on the motion. Counsel was informed that the hearing would be limited to oral argument. During the October 3, 1975, hearing the Appellees made no attempt to present testimony in support of their motion. On November 5, 1975, the District Court issued a decision denying both motions and requiring the parties to seek some resolution of their dispute within the confines of the internal union National

Plan. The District Court made no findings with respect to any of the requisites for the issuance of preliminary injunction, i.e., probable success on the merits, irreparable harm, or balance of interests, thus indicating that such requisites were not even considered by the Court.

Thereafter, in late January 1976, the Appellees renewed their motion for preliminary injunction. The Appellants cross-moved for summary judgment on February 9, 1976, and filed an affidavit which again went primarily to the exhaustion of remedies question. After considering the motions for nearly one month, the District Court issued a decision dated March 5, 1976, in which it made only one finding pertinent to the issuance of a preliminary injunction, i.e., that the Appellees were likely to succeed on the merits of their claim that the 1961 Memorandum was a viable agreement. The District Court made no findings with respect to the other requisites for the issuance of a temporary injunction and admitted that it could not at this early stage in the proceedings resolve the serious issues of fact with respect to the Appellees' likelihood of success on their claim concerning the 1961 Memorandum.

In view of the posture of the case when the renewed motion for preliminary injunction and Appellants' response were filed, a hearing by the Court was clearly the appropriate procedure to be followed. There was no apparent urgency in the present case like that in Semmes. The District Court denied the Appellees' first motion for preliminary injunction in November 1975, and the

case sat dormant for nearly three months before the renewed motion was filed. At no time did the Appellees request a temporary restraining order or attempt to establish an immediate need for injunctive relief. The Appellants should have been afforded an opportunity to present evidence relating to the motion for preliminary injunction. In the Semmes case, the parties were aware of the urgency of the plaintiff's request and of the District Court's desire to quickly hear and resolve the matter. A hearing was scheduled and the parties had an opportunity to present evidence. In the present case, the District Court set no hearing and failed to offer the parties any opportunity to present evidence prior to the issuance of the nationwide preliminary injunction.

Moreover, in view of the District Court's failure in its decision of November 5, 1975, to explore the Appellees' ability or inability to establish the requisites for the issuance of a preliminary injunction, one could assume that the Court had simply refused to seriously consider the Appellees' first motion for preliminary injunction. This assumption is reinforced by the District Court's apparent acceptance of the Appellants' argument that the case should be resolved pursuant to the internal union National Plan. Thus, before issuing a preliminary injunction on the Appellees' renewed motion, the District Court should have conducted a hearing for the purpose of determining whether the Appellees were properly entitled to an injunction.

Finally, it must be noted that the affidavits filed by the Appellants in the present case were not in any way as volum-

inous as those described in Semmes. The Appellants' affidavits were filed primarily to establish that the Appellees had not exhausted their internal union contractual remedies. The affidavits had a secondary purpose of raising issues of fact concerning the Appellees' contentions. If the Appellants had allowed the Appellees' allegations to go unanswered, the District Court might have taken the position that there were no issues of fact in the case and that an evidentiary hearing was unnecessary for the issuance of a preliminary injunction. This Court has held in Guardians Ass'n of N.Y.C. Police Dept., Inc. v. Civil Serv. Comm., 490 F.2d 400 (2d Cir. 1973) that a defendant cannot block the issuance of a preliminary injunction simply by refusing to submit evidence. The Court stated that: "To be sure, very little may suffice; an affidavit of a competent expert would ordinarily be enough to call for an evidentiary hearing. . ." 490 F.2d at 403.

More importantly, even if it be assumed that the Appellants in the present case could be deemed to have waived their rights to an evidentiary hearing by filing affidavits, such waiver would not have relieved the Appellees of their burden of establishing a reliable factual basis for a preliminary injunction. The Appellees would still have been required to establish a likelihood of success, irreparable harm, and/or greater harm to them by the denial of an injunction than the harm to the Appellants and the general public by the granting of an injunction. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423 (1974); Clairol, Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968). As this Court has

stated in Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1973), it cannot be "suggested that the parties could waive their right to a decision according to law and confer upon the district judge the power to decide by a toss of a coin."

In the present case, it is impossible for this Court to determine the means by which the District Court found that the Appellees were entitled to a preliminary injunction. The District Court explicitly stated in its March 5, 1976, decision that it could not resolve the issues of fact relating to the viability of the 1961 Memorandum of Understanding. Yet in order to grant the injunction, the District Court had to assume that the 1961 Memorandum of Understanding was a viable instrument despite an equally strong showing on affidavits that the Memorandum had been abrogated. Moreover, the District Court's decision makes absolutely no attempt to address any of the other requisites for the issuance of a preliminary injunction or make findings of fact with respect to these requisites. Based upon the District Court's decisions of November 5, 1975, and March 5, 1976, it is fair to say that the District Court did not decide the Appellees' entitlement to an injunction on the facts and law. See Dopp v. Franklin National Bank, supra.

While findings of fact pursuant to Rule 52(a), FRCivP, are not a jurisdictional requirement of an appeal, it is doubly important for a court to state its findings of fact setting forth explicitly how it decided that victory belonged to one side or the other where the court has not held an evidentiary hearing and

there are only conflicting affidavits in the record. The absence of specific findings in circumstances like those in the present case is a sufficient ground for reversal. SEC v. Frank, supra at 493;[3/] Dopp v. Franklin National Bank, supra at 879.

B. The District Court's March 12, 1976, Order Drastically Altered the Status Quo and Granted the Appellees Complete Relief

A preliminary injunction by its very label is "interlocutory, tentative, provisional, and interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness". Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). The purpose of a preliminary injunction is to preserve, as best as possible, the status quo pending trial on the Complaint which will determine if a permanent injunction should issue. It is improper to issue a preliminary injunction where such a grant would effectively provide all the relief sought in the complaint. The injunction should be designed to do no more than "to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." Hamilton Watch Co. v. Benrus Watch Co., supra; Union Management Corp. v. Koppers Co., 366 F.2d 199, 204 (2d Cir.

[3/] This Court stated in Frank that it was unnecessary to rule on the argument that the defendant had waived any objection to the court's proceeding on the basis of affidavits. "[W]e are confident that if the judge had endeavored to frame findings [of fact], the inadequacy of the affidavits as a basis would have become apparent to him."

1966); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969); Heldman v. United States Lawn Tennis Assoc., 354 F.Supp. 1241 (S.D.N.Y. 1973).

In the present case, the preliminary injunction issued by the District Court orders the Appellants to remove from jobsites, wheresoever located, persons represented by the Appellant labor organizations or any subordinate body of the Appellants who are performing drywall pointing and taping work (not in compliance with the jurisdictional definition set forth in the 1961 Memorandum of Understanding). It is the Appellants' contention that the District Court's injunction does not preserve the status quo, but, on the contrary, confers on the Appellees a completely new status. The injunction grants to the Appellees relief beyond which they have made any request in their Complaint and beyond which they have any legitimate interest. Rather than preserving the status quo, the District Court has drastically altered the status quo by its Order of March 12, 1976.

Although the dispute described in the Appellees' Verified Complaint is limited to the geographical or territorial jurisdiction of Local 1974 which allegedly includes the five boroughs of the City of New York and certain portions of Nassau County, the practical effect of the District Court's injunction is to require the OP&CMIA to remove from jobsites throughout the United States persons represented by every local union affiliated with the OP&CMIA. Thus, as a remedy for what is, at most, a local dispute, the District Court has granted to the Appellees a nation-

wide injunction. Moreover, the District Court has granted relief to the Appellees which they did not request in their Complaint. The only injunctive relief requested by the Appellees in their Complaint is that the Appellants be restrained from asserting jurisdiction over work involving drywall pointing and taping in violation of the 1961 Memorandum of Understanding. There is no request that the District Court require the Appellants to remove their members or members of any local union affiliated with the OP&CMIA from any jobsite wheresoever located. Even the Appellees' first motion for preliminary injunction made no such lofty request. Only in the Appellees' renewed motion for preliminary injunction do they request the District Court to require the Appellants to remove persons from jobsites, and even this request is, at least impliedly, limited to the Appellants and to the Metropolitan New York area.

The District Court's Order of March 12, 1976, creates an artificial status which was not in existence when this lawsuit commenced. The District Court would have recognized this fact if it had attempted to hold a hearing in the present case to determine the status quo prior to issuing a sweeping preliminary injunction. As a result, the parties to this litigation have attempted to establish for the first time at the Court of Appeals level their respective versions of the status quo. The Appellees have argued in their opposition to the Appellants' motion for stay that the status quo in the present case is established by the 1961 Memorandum of Understanding. But as discussed aove, there are

serious issues of fact with respect to the abrogation of such agreement, which issues the District Court has stated that it cannot resolve at this early stage in the proceedings. Moreover, affidavits submitted by the Appellants to this Court attached to the motion for stay and reply memorandum show that since June 12, 1975, persons represented for bargaining purposes by the Appellants have been performing pointing and taping work assigned to them by employers who are bound by and operating under a June 12, 1975, jurisdictional ruling of the BTEA in accordance with the New York Plan for the Settlement of Jurisdictional Disputes. Until reversed by the Impartial Jurisdictional Disputes Board under the National Plan, this ruling is binding jurisdictional law for employers who have agreed to abide by rulings made under the New York Plan. Outside of the New York area, members of the OP&CMIA have been performing pointing and taping work using plaster material in accordance with the 1947 Decision of Record contained in the "Green Book".

The Appellants state in their affidavits that there are approximately 213 persons represented by the Appellants who are performing drywall pointing and taping work in the New York area using plaster material. The Appellees dispute this number, but they admit that persons represented by the Appellants have been performing the disputed work since at least July 1, 1975. Thus, whatever the number of persons who will be affected by the preliminary injunction, the point is that persons represented by the Appellants were performing the disputed work inside and outside

the Metropolitan New York area before the suit was filed. As a result of the District Court's preliminary injunction, these persons will be required to leave their employment, presumably opening the way for members of Appellee Local 1974 to take over the vacant jobs. Thus, the District Court's Order has granted to Local 1974 a status which it did not have at the time of institution of this lawsuit and in fact, Local 1974 has been granted a status which it did not even request in its Complaint.

It must be noted that on March 9, 1976, the New York Supreme Court (J. Gellinoff) issued a memorandum decision in which the court found that a vacatur of the June 12, 1975, BTEA decision was warranted and further directing the holding of a new hearing by the BTEA. No order has yet been entered by the court. The Appellants contend that this decision in no way affects the status quo in the present case. Certainly, the Appellees cannot argue that because of the vacatur, work assigned to persons represented by the Appellants should be reassigned to members of Local 1974. Even without the BTEA decision, which was presumptively valid when the work was assigned, persons represented by the Appellants were and are entitled to do the work in question because of the May 19, 1947 Decision of Record contained in the "Green Book". The Appellants have consistently maintained that this decision is the controlling definition of drywall pointing and taping work jurisdiction. It is pursuant to this definition of work jurisdiction that persons represented by the Appellants around the country have been performing drywall pointing and taping work.

In any event, the point which should be reemphasized is that persons represented by the Appellants were and presently are performing pointing and taping work in accordance with valid work assignments by employers. By requiring these persons to leave their employment, the District Court has altered the status quo and has granted to the Appellees a completely new status. This is not the purpose of a preliminary injunction, and the District Court's Order of March 12, 1976, should be reversed.

C. The District Court has Failed to Consider and the Appellees have Failed to Establish the Basic Requisites for the Issuance of a Preliminary Injunction.

"The standard which governs the trial court in the determination of whether or not a preliminary injunction should issue is whether or not the moving party has carried the burden of clearly demonstrating a combination of either probable success on the merits and the possibility of irreparable damage, or the existence of serious questions going to the merits and the tipping of the balance of hardships sharply in its favor." American Brands, Inc. v. Playgirl, Inc., 498 F.2d 947, 949 (2d Cir. 1974). See Clairol, Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Robert W. Stack Jr., Inc. v. New York Stock Exchange, Inc., 466 F.2d 743 (2d Cir. 1972); Charlies Girls, Inc. v. Revlon, Inc., 483 F.2d 953 (2d Cir. 1973); Citizens for Better Environ-

ment, Inc. v. Nassau County, 488 F.2d 1353 (2d Cir. 1973); Stamicarbon N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974). In making its determination with respect to the moving party's request for an injunction, a district court is required "to weigh carefully the interests of both sides." Doran v. Salem Inn, Inc., ___ U.S. ___, 95 S.Ct. 2561 (1975).

In the present case, there is nothing in the record which would indicate that the District Court has considered the basic requisites for the issuance of a preliminary injunction or that the Appellees have established such requisites. The District Court's failure to consider applicable equitable principles before issuing an injunction is tantamount to an abuse of discretion justifying reversal of the Court's Order of March 12, 1976. Huber Baking Co. v. Stroehmann Bros. Co., 208 F.2d 464, 467 (2d Cir. 1953).

Pursuant to Rule 52(a), Federal Rules of Civil Procedure, the District Court was required to set forth specific findings of fact with respect to each of the factors which it considered in deciding to grant the Appellees' request for a preliminary injunction. The District Court's decision of November 5, 1975, contains no reference to either the Appellees' probable success on the merits or to any irreparable harm to the Appellees if an injunction is not issued. As previously noted, one could conclude from the Court's November 5, 1975, decision that the Court had simply refused to seriously consider the Appellees' first motion for preliminary injunction preferring to adopt, in principle, the Appell-

ees' argument that the dispute between the parties should be resolved in accordance with the internal union National Plan.

Similarly, the District Court's decison of March 5, 1976, contains no exploration of the equitable factors which the Court was required to weigh before issuing a preliminary injunction. While the District Court does indicate in its March 5, 1976, decision that the Appellees are likely to prevail on the merits of their claim that the 1961 Memorandum of Understanding is a viable instrument, the Court states that the "defendants have raised questions of fact going to the viability of the 1961 Memorandum" which cannot be resolved at this early stage in the proceedings. The District Court's decision contains no reference to irreparable harm to the Appellees or to the Appellants' interest in not having an injunction issue.

The key to the District Court's issuance of a preliminary injunction in the present case is contained in two findings which are set forth in the Court's March 5, 1976, decision: (1) the Appellants did not join with the Appellees and their international union, the IBPAT, in applying to the Joint Administrative Committee for relief, and later, the Appellants failed to take steps to resolve the matter administratively; and (2) the Joint Administrative Committee's failure to take action on the Appellees' application was sufficient to amount to exhaustion of remedies. Even if both of these findings were accurate,[4/] they do not bear

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[4/] As noted in the foregoing statement of facts, the Appellants did not understand the District Court's November 5, 1975, deci-

significantly on either the Appellees' likelihood of success on the merits of their claim or on the possibility of irreparable harm to the Appellees if relief is not granted. As previously stated, it is clear that the District Court did not seriously consider the Appellees' first motion for preliminary injunction. Nevertheless, even if the Court did consider the equitable factors set forth above in denying the Appellees' first motion, the findings announced by the District Court in its March 5, 1976, decision do not significantly change the fact situation in the present case so that the Appellees have now established the requisites for injunctive relief.

1. Probable Success On The Merits

As noted above, the Appellees' showing with respect to the viability of the 1961 Memorandum of Understanding is hotly disputed by the Appellants. Even statements made by the Appellees' own representatives show that the Appellees were not seriously relying upon the 1961 Memorandum of Understanding. In fact, in

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4/ Cont'd
sion to require them to separately petition the Joint Administrative Committee, but instead to cooperate with the Appellees in the filing of an appeal. The first notice that the Appellants had with respect to the Appellees' appeal to the Joint Administrative Committee was when the Appellants were served with the Appellees' renewed motion for preliminary injunction in late January 1976. Having not been contacted by the Appellees, the Appellants assumed that the Appellees at that time did not intend to appeal to the Joint Administrative Committee.

With respect to the Appellees' exhaustion of remedies, the Appellants will discuss such exhaustion more fully below.

the fall of 1974, Mr. Alfarone, Business Manager of Local 1974, stated that he did not claim pointing and taping work if plaster material was used in accordance with the May 19, 1947, Decision of Record contained in the "Green Book" (Boyle Affidavit attached to reply memo in support of motion for stay). Moreover, the National Labor Relations Board, which is charged by Congress to resolve work jurisdiction disputes under Section 10(K) of the National Labor Relations Act, 29 U.S.C. §160(K), (if the parties cannot) and which has had many years of experience in the jurisdictional thicket, decided a case in 1974 involving the pointing and taping of dryall in favor of the OP&CMIA without even referring to the 1961 Memorandum. See Painters and Drywall Finishers Local No. 79 and O'Brien Plastering Co., 213 NLRB No. 106, 87 LRRM 1591 (1974). Despite the fact that this NLRB case was brought to the District Court's attention, the District Judge granted an injunction which is so sweeping in scope that it will probably mean that employees represented by the Appellant OP&CMIA who were awarded their work by the NLRB pursuant to the above-cited case will be removed from their jobs in Denver, Colorado.

A comparison of the Appellees' showing with respect to the 1961 Memorandum which consists primarily of various decisions by the Impartial Jurisdictional Disputes Board during the early 1970s and the Appellants' equally strong showing that the Memorandum has been abrogated leads one to the inescapable conclusion that something more than the affidavits and exhibits contained in the record is necessary to determine whether the Appellees are

likely to succeed on the merits of their claim. The record is simply not complete enough to justify a conclusion that the Appellees have satisfied their burden of "clearly demonstrating. . . probable success on the merits." Nevertheless, even if there is a sufficient basis for such a conclusion, the Appellees' failure to exhaust their internal union, contractual remedies precludes them from probable success on the merits of their claim.

As noted above, the Appellant OP&CMIA and the Appellees, through their parent union the IBPAT, are affiliates of the Building and Construction Trades Department of the AFL-CIO and are bound by its constitution, Article X of which requires that all jurisdictional disputes between members of the Department are to be resolved in accordance with the National Plan. In short, the unions affiliated with the Building and Construction Trades Department have agreed to certain arbitration procedures for the settlement of jurisdictional disputes. The facts in the present case are undisputed concerning the Appellees' failure to comply with their agreement to arbitrate their jurisdictional dispute with the Appellants in accordance with the National Plan.

The Appellees filed in March 1975 a jurisdictional dispute with the BTEA under the New York Plan for the Settlement of Jurisdictional Disputes (a local counterpart of the National Plan) concerning the pointing and taping of drywall. On June 12, 1975, the BTEA issued a decision on the dispute stating that drywall pointing and taping work which is done with a plaster material known as "Sta-Smooth" is work which belongs to persons represented

by the Appellants. Through their parent union, the IBPAT, the Appellees appealed this jurisdictional ruling to the Impartial Jurisdictional Disputes Board under the National Plan and the Board agreed to hear the appeal. However, subsequent to the Impartial Board's acceptance of the appeal, Appellee Local 1974 instituted arbitration proceedings against the employer who had been involved in the jurisdictional dispute before the BTEA. The Impartial Jurisdictional Disputes Board ruled in accordance with Article VII, Section 5 of its procedural rules that the arbitration and the Appellees' appeal from the BTEA decision could not be pursued at the same time because the arbitration involved questions of work jurisdiction which were part of the Appellees' appeal to the Board. The Appellees refused to terminate the arbitration and the Impartial Board withdrew its acceptance of the appeal.

There is nothing in the record of the present proceedings to indicate that the Appellees have attempted to renew their appeal to the Impartial Jurisdictional Disputes Board or file a second jurisdictional dispute with the BTEA relating to a different jobsite. The BTEA and the Impartial Jurisdictional Disputes Board issue "job decisions" and it is not at all unusual to have these boards decide the same issues on different jobs.[5/]

[5/] In their papers opposing the motion for stay, the Appellees have argued that they did attempt to mediate a second pointing and taping dispute through the BTEA on August 29, 1975, but that the OP&CMIA "stymied" the mediation by refusing to state its position regarding the 1961 Memorandum. This mediation was less than a good faith effort by the Appellees to exhaust their contractual

The Appellees have argued at length throughout this case that it would be futile for them to exhaust their remedies under the National Plan because of a December 1973 decision by the Joint Administrative Committee, which supervises the Impartial Jurisdictional Disputes Board, to "defer action" on jurisdictional disputes involving drywall pointing and taping work. Appellees claim that this decision means that the Impartial Board will refuse to hear any pointing and taping dispute involving the 1961 Memorandum of Understanding. As support for their argument, the Appellees point to the fact that the BTEA did not consider the 1961 Memorandum as part of its June 12, 1975, decision.

There are at least two problems with the Appellees' argument, the most important of which is that the Impartial Jurisdictional Disputes Board did agree in July 1975 to hear the appeal from the BTEA decision. Having put into evidence the 1961 Memorandum of Understanding before the BTEA, the Appellees were free to argue its applicability before the Impartial Board. If the Board had refused to consider the Memorandum, the Appellees' position might be considerably more persuasive. By failing to follow the procedural rules of the Impartial Jurisdictional Disputes Board, the Appellees have thus far prevented themselves from get-

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5/ Cont'd
remedies. At the conclusion of the mediation hearing, the Appellants were served with the Complaint in the present lawsuit. Moreover, the Appellees had a right to demand arbitration of the matter discussed at the August 29 meeting, but thus far, they have preferred to pursue their various lawsuits rather than their contractual remedies.

ting a hearing before the Board, yet, they ask the Court to assume that such a hearing would be futile in any event. The Appellants contend that in light of the Impartial Board's acceptance of the Appellees' appeal from the BTEA decision, no such assumption can be made by the Court. If the Appellees had merely complied with the established rules of the Impartial Jurisdictional Disputes Board when their appeal was filed, this whole matter would have been resolved long ago.

The Appellees are also on weak ground with respect to their argument that the BTEA failed to consider the 1961 Memorandum of Understanding in its June 12, 1975, decision. During the BTEA hearing the Appellees relied heavily upon the "plaster vs. adhesive" issue as set forth in the May 19, 1947 "Green Book" Decision of Record throughout the proceedings. In fact, a review of the transcript of the June 4, 1975, hearing before the BTEA discloses that the 1961 Memorandum was only briefly mentioned by the Appellees and that the major portion of the testimony and arguments was directed to the "plaster vs. adhesive" issue. With this background, the Appellees are in a difficult position to argue that the BTEA ignored other relevant issues. In any event, as stated above, the BTEA's refusal to give weight to the 1961 Memorandum of Understanding would in no way have prevented the Appellees from arguing the applicability of the 1961 Memorandum to the Impartial Jurisdictional Disputes Board.

Finally, it should again be noted that the New York Supreme Court has issued a decision stating that a vacatur of the

June 12, 1975, BTEA decision is warranted and directing the holding of a new hearing. In light of this development, it would certainly seem that the Appellees have not yet exhausted their contractual remedies. In fact, until a new decision is issued by the BTEA and until the Impartial Jurisdictional Disputes Board has had an opportunity to act on any appeal, this entire proceeding is premature.

The courts are in unanimous agreement that when the parties have established a procedure for the settlement of disputes that procedure must be exhausted before resorting to the courts. We need only look to one of the cases relied upon by the Appellees in their memoranda to the District Court, International Hod Carriers Local 33 v. Mason Tenders District Council, 291 F.2d 496 (2d Cir. 1960), to find support for this principle. This case involved a suit by a local union against a district council of which it was a member, for a declaratory judgment and injunctive relief based upon an alleged agreement concerning the assignment of work among Mason Tenders in New York City. The Court of Appeals affirmed the District Court's granting of summary judgment in favor of the defendants on the grounds, inter alia, that the plaintiff local had failed to exhaust its "contractual administrative remedies" (appeal to the General Executive Board), through the procedures established in the council's constitution by which both plaintiff and defendants were bound. As the District Court in this case pointed out:

> "Plaintiff agreed when it became affiliated with the Council to be bound by the Constitutional requirements that it appeal its grievances within the organization; that remedy is available to it and it is 'plain, speedy and adequate'. . . There is no reason to anticipate or suspect that the appeal will be futile because of the prejudice or bias on the part of the Board. If as plaintiff contends, the decision of the District Council was arbitrary and contrary to justice and custom, we must assume that the General Executive Board will adjust the difficulty or dispute in satisfactory fashion. Where there is this possibility (or probability), a Court should not disregard the agreement of the parties and act to give an opinion or declare principles of law on a matter which may be rendered moot by the decision of a more competent body."

Local 33, Hod Carriers v. Mason Tenders, 186 F.Supp. 737, 742 (S.D.N.Y. 1960).

The principles expressed by Judge Ryan in the Hod Carriers case are equally applicable in the instant proceeding. Appellees, if they complied with the rules of the Impartial Jurisdictional Disputes Board would have had ample opportunity to present their case and there is no reason to believe that Appellees would not have received a fair hearing and a just result. They should not be permitted to bypass their contractually agreed upon disputes settlement machinery and seek relief from the Court.

Exhaustion of internal union procedures before resort to the courts has also been required in Lumber Workers v. Millmen's Local 1495, 169 F.Supp. 765 (N.D. Cal. 1958); Parks v. International Brotherhood of Electrical Workers, 203 F.Supp. 288 (D. Md. 1962), rev'd on other grounds, 314 F.2d 886 (4th Cir. 1962); Local

#1547, International Brotherhood of Electrical Workers v. Local 959, International Brotherhood of Teamsters, 507 F.2d 872 (9th Cir. 1975). See also Anson v. Hiram Walker & Sons, 222 F.2d 100 (7th Cir. 1955); Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (Sup.Ct. Pa.W.D. 1960).

The policy that federal courts will not intervene in intra-union disputes until appeals are disposed of was set forth in Local 28, IBEW v. IBEW, 197 F.2d 99 (D.Md. 1961), and the reasoning of that court is equally applicable in a situation such as the present case where the parties have contractually agreed to settle their jurisdictional disputes through the Impartial Jurisdictional Disputes Board. The Court there stated:

> "The rule that courts will not intervene in intra-union disputes until appeals within the union have been exhausted is based upon sound policies: that union appellate tribunals may take corrective action, reducing the burden on the courts; that the courts may have the benefit of the expert judgment of those tribunals; and that unions should be given full autonomy and responsibility." 197 F.Supp. at 107.

In fact, this policy of non-interference by the judiciary has been applied in the context of disputes involving work jurisdiction and the National Plan. For example, in Sheet Metal Workers Union v. Aetna Corp., 246 F.Supp. 236 (D. Mass. 1965) the court examined a situation in which a union had filed suit under Section 301 of the Act, 29 U.S.C. §185, requesting the court to vacate an arbitration award of the Appeals Board issued under the plan then being utilized by the Building and Construction Trades Department

of the AFL-CIO for the settlement of jurisdictional disputes. The union had requested the Joint Negotiating Committee to consider the same question presented to the court but had not allowed the Committee to resolve the question before filing suit. After considering the matter, the district court dismissed the complaint finding that: "The parties have provided in their agreement for administrative decision of the very question which Plaintiff now asks the Court to determine." The court further stated that:

> "There can be no doubt that if the Court took it upon itself to interfere in this dispute, the attempt to settle work assignment disputes in the construction industry by means of an arbitration agreement would soon be abandoned." 246 F.Supp. at 240.

The Court of Appeals affirmed the dismissal of the complaint pointing out that the jurisdictional questions involved should not be handled by the courts but these questions are best handled "by those acquainted with 'the common law of the shop'." Sheet Metal Workers v. Aetna Corp., 359 F.2d 1 (1st Cir. 1966).

In Lathers v. Dunlop, 382 F.2d 176 (D.C.Cir. 1967), cert. den., 389 U.S. 971 (1967), the Lathers sued the Joint Board members to set aside a jurisdictional decision on the basis that the Board had exceeded its jurisdiction in issuing a national decision. The Joint Board referred a series of disputes between the Lathers and Carpenters to an Impartial Umpire in accordance with the provisions of the Plan for settling jurisdictional disputes to have a national decision issued regarding the particular work involved. The Lathers, however, claimed in court that there was

already a recognized decision or agreement covering the work involved and that submission by the Joint Board to an Umpire was improper. The Court of Appeals, in affirming summary judgment in favor of the defendants, pointed out that the Joint Board had jurisdiction "to make a determination whether the dispute is or is not governed by a decision or agreement of record."

The situation in the instant case is basically similar. Here Local 1974 wants the Court to determine the validity of the 1961 Memorandum of Understanding and whether it applies to the work disputes alleged in the Complaint. However, as the Court in Lathers, supra, pointed out, there is a contractual administrative body already assigned this task - here the Impartial Jurisdictional Disputes Board - and the parties have given it the authority to determine whether, in fact, the 1961 Memorandum of Understanding governs the dispute. As the D.C. Circuit pointed out:

> ". . . we conclude that the signatory parties conferred jurisdiction on the Joint Board to determine whether there existed a controlling agreement or decision of record. . ."
> 382 F.2d at 179.

2. Irreparable Harm and Balance of Interests

As previously noted, the District Court has made no attempt to determine whether the Appellees will be irreparably harmed if an injunction is not issued in the present case. In fact, the Appellees' showing with respect to irreparable harm prior to the argument before this Court on the motion for stay, was primarily a series of conclusory allegations to the effect

that the Appellees will "suffer grievous and material injury irreparable at law and will continue to suffer such injury unless this Court otherwise orders" (369a). A hearing would have fleshed out this allegation, or as Appellants contend, demonstrate its lack of merit. In short, a hearing would have presented an opportunity to explore the various competing interests in the present case prior to the issuance of a preliminary injunction. Instead, as part of their motion to this Court for stay, the Appellants have been forced to demonstrate here the extent to which the District Court's injunction has created a hardship on them, and in response, the Appellees have for the first time attempted to demonstrate the irreparable harm which they claim will result to them if an injunction is not issued.

Because of the nationwide scope of the District Court's March 12, 1976, Order, which requires the Appellant OP&CMIA to remove from jobsites throughout the United States persons represented for bargaining purposes by any subordinate body/local union of the OP&CMIA, the Appellants' interest in not having an injunction issue is necessarily superior to the Appellees' interest in obtaining an injunction. The Appellees' interest in this case is legitimately limited to only the Metropolitan New York area. Affidavits furnished by the Appellants establish that in the New York area alone, there are approximately 213 persons who will lose their employment as a result of the District Court's Order. The number of people affected by the Order throughout the United States is impossible to ascertain, but easily said Order could deprive

hundreds of persons of their livelihood. Most of these people will not be able to readily obtain other employment and many persons will be required to go on public welfare in order to provide food and shelter for their families. Individual financial defaults resulting from the loss of income and/or health and welfare benefits will undoubtedly result from the District Court's Order. These defaults can never be rectified by a later reversal of the Order.

As the Court is aware, construction projects often involve very tight completion schedules which, if interrupted, result in the payment of liquidated damages by the delaying contractors. The mass removal of persons from jobsites contemplated by the District Court's March 12, 1976, Order will obviously cause a great deal of disruption of jobsites. Delays will be experienced by contractors seeking to replace employees who are ordered off their jobs and construction work will be slowed considerably. Even if the Appellees have available to them a labor pool which can be used to replace every person removed in the Metropolitan New York area, this substitution process will necessarily result in the loss of productivity and construction delays. Persons removed from jobsites outside of the Metropolitan New York area cannot be replaced by members of the Appellees, thus, the delays in other parts of the country will be considerably longer than the delays in New York City. Contractors who suddenly lose their em-employees as a result of the District Court's Order are very likely

to seek relief in the courts and before arbitrators, thus subjecting the Appellants to potential financial liability.

The District Court's obvious lack of consideration for the respective interests of the parties in the present case is amply demonstrated by the bond set by the Court for the injunction, i.e., $25,000. Each of the 213 persons represented by the Appellants in the New York area receives $11.20 per hour in wages and fringe benefits. Multiplied by 213, this wage package amounts to approximately $2,385 per hour and $95,400 per 40-hour week. The bond set by the Court barely contemplates one quarter of a week.

In response to the Appellants' showing as set forth above, the Appellees have attempted to establish that there are less than 16 persons who will be required to leave their jobs in the Metropolitan New York area as a result of the District Court's March 12, 1976, Order. The Appellees figures are extremely questionable in light of the affidavit submitted by the Metropolitan New York Drywall Contractors Association, Inc. (attached to Motion to Intervene) which shows that 50% of the pointing and taping work done for Association members is performed by persons represented by the Appellants. Assuming, however, that the Appellees' figures are correct and that there are only 16 persons in the Metropolitan New York area who will be forced to leave their employment because of the District Court's Order, it is difficult to perceive the Appellees' "overwhelming" need for an injunction.

In any event it must be repeated that the Court of Appeals is not the forum at which the parties' respective interests should be weighed. The District Court was required to hold a hearing, take testimony and make findings of fact with respect to the irreparable harm to the Appellees if an injunction was not issued and the harm to the Appellants if an injunction was issued. At present, there is no reliable record that the Appellees are in danger of any harm, irreparable or otherwise, compelling the issuance of a nationwide injunction which will literally deprive hundreds of persons of their employment.

II. The District Court Lacked Jurisdiction To Issue An Injunction Against The Appellants

The subject matter of the District Court's injunctive relief in the present case is a jurisdictional dispute between the Appellees and the Appellants with respect to drywall pointing and taping. As previously noted, the Appellees claim that the Appellants are improperly asserting both work jurisdiction over pointing and taping work to which they have no right under the 1961 Memorandum of Understanding and bargaining or representational rights over the persons performing such work. Clearly, the activity complained of by the Appellees amounts to a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., and it should not have been enjoined by the Court.

Section 101 of the Norris-LaGuardia Act, 29 U.S.C. §101, provides that:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

The term "labor dispute" is defined in Section 113(c) of the Act, 29 U.S.C. §113(c), which states as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

There can be no question that the jurisdictional dispute between the Appellees and the Appellants in the present case is a "controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment", and the courts have so held. For example, in Duris v. Phelps Dodge Corp., 87 F.Supp. 229 (D.N.J. 1949), a case which also involved a jurisdictional dispute between warring labor organizations as to which of them would function as the collective bargaining representative with an employer to the exclusion of the other, the court ruled that there was a "labor dispute" within the meaning of the Norris-LaGuardia Act and that injunctive relief could not be granted. The Duris case was filed under 29 U.S.C. §185 by a labor organization which had been ousted

from the CIO seeking specific performance of a collective bargaining agreement and injunctive relief against a rival labor organization. The complaint alleged that the plaintiff labor organization had been replaced as the collective bargaining agent for the employees of Phelps Dodge by the rival labor organization which was newly chartered by the CIO. See Fitzgerald v. Haynes, 146 F.Supp. 735 (M.D. Pa. 1956), aff'd, 241 F.2d 417 (3d Cir. 1957). See also Blankenship v. Kurfman, 96 F.2d 450 (7th Cir. 1938); Fur Workers Local 72 v. Fur Workers Union, 105 F.2d 1 (D.C. Cir. 1939), aff'd, 308 U.S. 522 (1939); International Brotherhood of Teamsters v. International Union of Brewery Workers, 106 F.2d 871 (8th Cir. 1939); Green v. Obergfell, 121 F.2d 46 (.D.C. Cir. 1941), cert. denied, 314 U.S. 637 (1941); Wilson Employees' Representation Plan v. Wilson & Co., Inc., 53 F.Supp. 23 (S.D. Cal. 1944).

In each of the above cited cases, the court found that a jurisdictional dispute between labor organizations, with or without the existence of any dispute between an employer and members of one of the competing labor organizations, amounted to a "labor dispute" within the meaning of the Norris-LaGuardia Act and injunctive relief could not be granted in view of the express prohibition contained in the Act. Section 104 of the Norris-LaGuardia Act specifically enumerates those acts not subject to restraining orders or injunctions:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor

> dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> * * * * * * * *
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 103 of this title."

Clearly, the activity which has been enjoined in the present case, i.e., the assertion of work jurisdiction over drywall pointing and taping and the assertion of bargaining rights over persons performing such work, falls within the coverage of the above-cited provision. In Brick & Clay Workers v. District 50, 345 F.Supp. 495, 80 LRRM 2871, 2872-3 (E.D. Mo. 1972), the court found that an injunction could not be issued in a dispute between two labor organizations with respect to the alleged breach of a "no-raiding" agreement which prohibited each of the parties from attempting to organize members of the other. The court held that the action which the plaintiff was seeking to enjoin was specifically protected by Section 104 of the Norris-LaGuardia Act. In the present case, the agreement which the Appellants have allegedly breached concerns only work jurisdiction; however, the Appellees contend that the assertion of work jurisdiction and the assertion of bargaining rights over the persons performing the work in question are essentially one and the same thing. Thus, there is no basic difference between the present case and the Brick & Clay Workers case.

The court noted in Brick & Clay Workers that several other courts have specifically enforced "no-raiding" agreements which contained arbitration clauses. Citing United Textile Workers of America v. Textile Workers Union, 258 F.2d 743 (7th Cir. 1958) and International Brotherhood of Firemen and Oilers v. International Association of Machinists, 338 F.2d 176 (5th Cir. 1964) as examples, the court stated that both cases held that the arbitration clause of a no-raiding contract was enforceable by injunction. Distinguishing the situation in Brick & Clay Workers from the above-cited cases, the court found that the no-raiding agreement sought to be enforced by the plaintiff did not contain an arbitration clause. In the present case, the Appellees are contractually bound to resolve their dispute with the Appellants in accordance with specific arbitration procedures set forth in the National Plan. However, in the case at bar, the Appellees have not requested the District Court to compel arbitration of their dispute with the Appellants. On the contrary, the Appellees ask the Court to grant them the relief that they should be seeking under the arbitration procedures set forth in the National Plan. The Appellees cannot, on the one hand, ignore the arbitration procedures contained in the National Plan and, on the other hand, ask for an injunction specifically enforcing the 1961 Memorandum. If an injunction should have issued at all in the present case, it should have issued to compel arbitration, not to enjoin conduct specifically protected by the Norris-LaGuardia Act.

In any event, even if the District Court correctly concluded that an injunction should issue, said injunction should not have been granted prior to compliance by the Court with the procedural requirements set forth in Section 107 of the Act, 29 U.S.C. §107. This provision requires that no court of the United States "shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint. . . and testimony in opposition thereto. . ." In the instant case, there was no hearing or presentation of live testimony offered in support of the allegations contained in the complaint prior to the issuance of the preliminary injunction. It is a settled principle of law that injunctions issued in labor disputes which are not preceded by hearings in open court with live testimony in support of the allegations in the complaint are invalid and must be vacated. This basic requirement of Section 107 is in no way eliminated by the fact that the lawsuit is filed under Section 301, 29 U.S.C. §185, and is otherwise exempt from the Norris-LaGuardia prohibition against injunctions. Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974).

Moreover, Section 107 of the Norris-LaGuardia Act requires the Court to make certain specific findings of fact prior to the issuance of an injunction and to set forth these findings in its order. Among the findings specified by the Act are:

> "(c) That as to each item of relief granted greater injury will be inflicted upon the defendants by the granting of relief;"

The Second Circuit has ruled that there is no basic inconsistency between §107 and the policies of 29 U.S.C. §185 which affects the requirement that the court upon the basis of live testimony in open court specifically find that "as to each item of relief granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief." Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974). Such a finding is the least that should be expected prior to the issuance of an injunction in a labor dispute. See Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938); IUE v. General Electric Co., 341 F.2d 571 (2d Cir. 1965). In the present case, no findings remotely similar to those required by Section 107 were made by the District Court. Accordingly, the injunction issued should be vacated.

CONCLUSION

For all of the foregoing reasons, the District Court's Order of March 12, 1976, should be reversed. The Appellants respectfully request the Court to extend its stay of the District Court's Order until a decision is rendered on this appeal.

Respectfully submitted,

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Service of three ③ copies of the within
is admitted this 14th day of April 1976

Attorney for Appellees